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Supreme Court of the United States

OCTOBER TERM, 1962

No. 527

COMPANIA ANONIMA VENEZOLANA DE NAVEGACION (VENEZUELAN LINE),
Petitioner,

versus

A. J. PEREZ EXPORT COMPANY, ETC., and TYLER REFRIGERATION CORPORATION,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May It Please The Court:

OPINIONS BELOW

The petition omits the "Opinion" of the District Court which is in the form of Findings and Conclusions as required by Rule 46½ of Supreme Court Admiralty Rules.

These Findings and Conclusions are printed in Appendix "A" hereof.

THE QUESTIONS PRESENTED

Petitioner would have the Court infer that this case involves conflicts between Circuits and interpretation of

"Congressional policy", "the United States Shipping Act" and a situation where there has been "favoring of shippers by a common carrier".

The plain truth is, as appears from the Trial Court's Findings of Fact, that the original carrier, the nominal petitioner herein, has no interest, whatsoever, in this litigation, now or formerly, because THE CARRIER HAD BEEN PAID THE FREIGHT CHARGES FOR ALL OF THE SHIPMENTS INVOLVED before these suits were begun.[1]

The only question ever presented in this litigation was whether the carrier's *agent*, found to have been guilty of laches,[2] should be allowed to reap any benefits from its unfair and inequitable conduct in consorting with a dishonest freight forwarder with whom that agent dealt throughout the transactions in suit.

The obvious answer, the one given by both lower courts, is that the agent should not prevail against these respondents.

THE FACTS

In the interest of brevity, respondents shall not attempt to traverse in detail petitioner's statement of the "Facts."

Instead, we submit that the facts of this case are those found by the District Court, accepted *in toto* by the Court

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[1]See Appendix "A", Finding No. 26.
[2]See Appendix "A", Findings Nos. 23 through 27; Conclusion No. VI.

of Appeals and unchallenged by petitioner. The facts are contained in Appendix "A" hereof.[3]

ARGUMENT

Respondents have no quarrel with petitioner's erudite recitation of so-called "Carrier Law": the *carrier* must collect its freights. However, here, the *carrier has collected its freights*[4] and, what is more, *the respondents have paid them.*[5] Therefore, no aspect of this case requires, or even allows, the application of any of the philosophies, policies or legal principles upon which petitioner so hopefully relies.

Since the carrier has collected the proper amount of charges for the shipments involved, and since the respondent-shippers have paid that same amount to the freight forwarder with whom the carrier's agent colluded, there has been neither a "failure of the carrier to collect" nor a "favoring of shippers".[6]

Consequently, when it says that the instant appellate opinion conflicts with the decision of the Court of Appeals for the Tenth Circuit in *Empire Petroleum Co. v. Sinclair Pipeline Co.*,[7] petitioner is departing materially from the facts.

Petitioner makes much of what it chooses to call an "unpermitted choice of Law of Subrogation."

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[3]R. pp. 375-382.
[4]R. p. 26; Appendix "A", Finding No. 26.
[5]R. p. 380, 381; Appendix "A", Findings Nos. 17 and 23.
[6]This is made abundantly clear by the opinion of the Court of Appeals: 303 F. 2d at page 694.
[7]282 F. 2d 913 (CCA 10th, 1960).

"Subrogation here", says petitioner, "is not derived from Admiralty or from the English Equity, but arises exclusively from Louisiana Law of Suretyship as a result of payment under a contract of guaranty made and to be performed in Louisiana."[8]

The first observation which must be made to the foregoing assertion is that, in so stating, the petitioner has apparently misread the Agency Agreement upon which it seeks to rely.

By its own terms, the agreement was to be performed in "the Gulf Ports, Baltimore and Philadelphia."[9] Consequently, how can petitioner say that Louisiana law is any more applicable to these transactions than Texas law, or Maryland law, or the law of the Commonwealth of Pennsylvania!

The second observation required is with respect to petitioner's reasoning that the subrogation law of Louisiana must control because the agency agreement is "non-maritime" and it "becomes involved in this case only by way of defense."[10]

To this contention we can but say that there is no basis. Apparently, petitioner concedes, as it must, that the cause of action which it has sought to assert against these respondents arises out of an alleged breach of a maritime contract, that is, an ocean bill of lading, several, in fact.[11] That such

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[8]Petitioner's Application, p. 23.
[9]Opinion of the Court of Appeals, 303 F. 2d at page 695, n. 6.
[10]Petitioner's Application, p. 23.
[11]The libels herein contain the plain averment that the claims asserted therein are "in a cause of contract, civil and maritime": R. pp. 2 and 10.

contracts are "maritime" is hardly open to dispute.[12] Nowhere, in its pleadings or proof, however, did petitioner ever sue these respondents on any agency or guaranty agreement. Respondents did not plead any guaranty agreement involving the petitioner. The only place any such contract of guaranty had in this litigation was to establish the "capacity" of *Isbrandtsen* to prosecute this action in the name of Venezuelan line, after the latter was found to have no real interest herein.[13]

But, once petitioner's *capacity* to prosecute the actions was established, we respectfully submit that maritime law, not the law of any state, determined the nature and extent of the substantive rights which could be asserted.

Thus, in the instant case, *Isbrandtsen* utilized this guaranty merely to show that it was not a "volunteer" in paying these freights to the carrier. Beyond that, the agreement cannot be used to abrogate any maritime law defenses which respondents possessed.[14]

The courts below, therefore, were not "free to choose" the law in the first place, and, consequently, *Erie R. Co. v. Tompkins*[15] is entirely irrelevant.

Notwithstanding the foregoing, and even assuming that Louisiana law were applicable here, the mere fact that our "subrogation" law happens to be in the form of codal articles does not thereby alter the principles upon which

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12See Gilmore and Black, The Law of Admiralty, pp. 20-21; 1 Benedict, On Admiralty, p. 27.
13 2 Benedict, On Admiralty, pp. 43, 88-85.
14So. Pacific Co. v. Jensen, 244 U. S. 205 (1917).
15304 U. S. 64 (1938).

it rests. As a matter of historical fact, our codified version and the so-called "equity" principles stem from a common seed: the Roman or civil law.[16]

Equity is no stranger to Louisiana jurisprudence.[17] Even in the face of literal statutory verbiage, equitable principles have been envoked to accomplish a just result by Louisiana courts.[18]

True it may be that Louisiana law is "express" to the extent of providing that one who is obligated to pay and pays the debt of another is "subrogated" to the creditor's rights against the co-debtor. However, the law does not even allude to the situation extant here, where the party otherwise entitled to subrogation has by its improper conduct "created", so to speak, the debt which is paid.[19]

In such circumstances, under Article 21 of the Louisiana Civil Code of 1870, we submit that a Louisiana court would be at liberty to "decide according to equity" by "an appeal . . . to natural law and reason" which are the underlying principles upon which the entire concept of "subrogation" is founded.[20]

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[16]83 C.J.S. 578-579.

[17]Article 21 of the Louisiana Civil Code of 1870 provides: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

[18]See Leigh v. Wright, 183 La. 765, 164 So. 794 (1936).

[19]This is implicit in the Trial Court's Findings, particularly Findings Nos. 14, 19, 20, 21, 22, 23, 24, 25 and 27: Appendix "A"; see also Conclusion III: Appendix "A".

[20]83 C.J.S. 578-580.

In so doing, no court could be unmindful of the maxim that:

> WHERE ONE OF TWO INNOCENT PERSONS MUST SUFFER BY THE FRAUDULENT CONDUCT OF A THIRD, THE ONE WHO HAS, BY HIS NEGLIGENCE OR FAILURE TO DO SOMETHING THAT A PRUDENT MAN UNDER THE CIRCUMSTANCES SHOULD HAVE DONE, ENABLED THE FRAUD TO BE COMMITTED MUST SUFFER THE LOSS OCCASIONED THEREBY.[21]

The Trial Court's Finding is that this party, who seeks to assert a carrier's rights, "knew . . . that (the forwarder) had been paid in full by respondents for the amount of the freights here involved."[22]

The Trial Court unequivocally found that the carrier's agent, who now seeks to don the carrier's shoes, followed its "collusion course" to curry the favor of the forwarder, and thus advance its own selfish business interests.[23]

Applying the maxim to these facts, whether one reasons, as did the Appellate Court below, that such circumstances preclude the carrier's agent from *seeking* subrogation,[24] or whether one reasons that the agent may seek and obtain subrogation, but, then, must return that which its improper conduct caused these respondent-shippers to lose, the same

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[21] 83 C.J.S. 594.
[22] R. p. 381: Finding No. 24.
[23] R. p. 382: Finding No. 27.
[24] Opinion of the Court of Appeals, 303 F. 2d at page 696.

just result obtains: respondents are not called upon to pay these freight charges again.

CONCLUSION

Regardless, then, what route is employed to arrive at the just end result which has thus far obtained herein, there is no merit to this application for *certiorari* and the petition should be denied.

Respectfully submitted,

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APPENDIX "A"

FINDINGS OF FACT AND CONCLUSIONS OF LAW
ADMIRALTY NOS. 2793 & 2794

(Titles Omitted) (Filed: July 12, 1961)

CHRISTENBERRY, J:

These two actions involve claims for ocean freight charges on several shipments which respondents made via libelant's steamship line during 1954.

Respondents admit that libelant performed its contracts of carriage, but they deny liability on the following grounds:

(1) that the nominal libelant has no real interest in this controversy because it has been paid these freight monies, either by reason of respondents' payment thereof to a freight forwarder or by reason of the fact that libelant's agent remitted the monies to libelant, or by both;

(2) that the libelant is *estopped* to deny payment because of its conduct, through its agent, with the freight forwarder; and alternatively,

(3) that the claims are stale and time-barred because of libelant's laches in asserting them.

The cases were consolidated for trial because they involve substantially identical issues and were submitted by the

parties upon their respective pleadings, evidence, exhibits and arguments, after which the court took time to consider.

Now, upon due consideration, and pursuant to Supreme Court Admiralty Rule 46-1/2, the court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

Libelant, Compania Anonima Venezolana de Navegacion (hereinafter referred to as Venezuelan Line), is a foreign corporation, engaged in the steamship business, operating ocean freighter service from the Port of New Orleans to South America.

2.

Respondent, Tyler Refrigeration Corporation (hereinafter referred to as Tyler), is an American corporation, with its principal office in Niles, Michigan.

3.

Respondent, A. J. Perez Export Company (hereinafter referred to as Perez), is a partnership composed of Messrs. A. J. and Louis Perez, with its principal office in the City of New Orleans, Louisiana.

4.

During the year 1954, Libelant carried five shipments of ocean freight for Perez under the following bills of lading, dates and for the freight charges shown below:

B/L	*Date*	*Freight Charge*
40	11/26/54	$ 2,961.09
4	8/ 6/54	822.19
6	7/ 2/54	1,011.70
16	6/23/54	1,577.15
18	6/11/54	1,506.52
	TOTAL FREIGHTS	$ 7,878.65

5.

During the same year, libelant carried three shipments of ocean freight for Tyler under the following bills of lading, dates and for the freight charges shown below:

B/L.	*Date*	*Freight Charge*
7	7/ 9/54	$ 1,521.04
27	7/30/54	2,322.51
29	8/ 6/54	764.33
	TOTAL FREIGHTS	$ 4,607.88

6.

In each of these eight transactions, Venezuelan Line was represented by Isbrandtsen (New Orleans), Inc., (herein-

after referred to as Isbrandtsen), a Louisiana corporation, with its principal office in New Orleans.

7.

The selection of libelant's line and all arrangements for booking and clearing of the shipments were made by Alonso Shipping Company, Inc. (hereinafter referred to as Alonso), a Louisiana corporation, having its domicile in New Orleans.

8.

The business relationship between Isbrandtsen and Alonso had begun in about 1949, at which time Alonso applied to Isbrandtsen for "credit privileges" which, after investigation by Isbrandtsen, Alonso received.

9.

Neither respondent ever sought either directly or indirectly, any so-called "credit privileges" with libelant or its agent, Isbrandtsen, nor did either respondent seek such privileges for Alonso.

10.

On each of the transactions in suit, Alonso prepared the respective bills of lading on libelant's forms which were furnished to Alonso by Isbrandtsen.

11.

After completing the information on the bills of lading relative to the cargo markings, shipper, consignee, vessel, voyage and weights, Alonso returned the bills of lading to Isbrandtsen for completion as to freight charges, at which time Isbrandtsen perforated several of the documents with the word "copy" thus indicating they were copies of original bills of lading, and allowed Alonso to take the same, notwithstanding the multilithed word thereon; "PREPAID".

12.

When the cargo was received on board the vessel, Isbrandtsen acting for libelant, then inserted by rubber stamp the words "Original — Freight to be Pre-Paid" and signed several of the same bills of lading, which Alonso then forwarded to the consignees of the cargo overseas.

13.

After receiving the first copies, with the multilithed word "Prepaid" and libelant's authenticating "copy" perforation thereon, Alonso forwarded the same to respondents with its statement for services rendered and expenses incurred, including the ocean freight charges and, in all but two of the instances in suit, received payment in full prior to the time that the so-called original bills of lading were ever signed by Isbrandtsen.

14.

When libelant received the cargo on board and signed

the bills of lading, Alonso was allowed to receive them without prepaying the freight charges; instead, Alonso executed so-called "Due Bills" or "I.O.U.'s" which, in some instances, included freight charges for shippers other than either respondent herein.

15.

These due bills provided that they should be paid within three days of their respective dates, which correspond with the dates on the various bills of lading sued upon herein.

16.

In addition to the fee which Alonso charged respondents on each of the shipments herein involved, Alonso was also entitled to a commission of 2-1/2 per cent of the freight charges from libelant, which amount exceeded greatly Alonso's remuneration from respondents.

17.

Both respondents had remitted all of the freight charges and other amounts to Alonso long before libelant made any demand for payment upon respondents.

18.

Alonso dealt on a more-or-less daily basis with libelant, through Isbrandtsen, and a running tabulation was kept by libelant's agent of the monies due from Alonso on account of the due bills which Alonso signed.

19.

The system adopted by libelant's agent and Alonso for the payment of these due bills was not a chronological method of applying Alonso's remittances to the oldest due bill first but, on the contrary, Alonso's payments to Venezuelan were applied against whatever due bills, or items thereon, which the particular remittance would completely liquidate.

20.

Neither respondent ever acquiesced in, or had any knowledge of, this method of imputing payments.

21.

Because of the system adopted by Isbrandtsen and Alonso for the payment of the freights by Alonso, it is impossible to determine how much of respondents' remittances to Alonso was used by libelant to apply to the shipments of others on which Alonso had also been allowed credit privileges; the court infers, however, that this did occur over the period between the first and the last shipment made for each respondent herein.

22.

Notwithstanding the fact that the bills of lading required the pre-payment of freight charges, and notwithstanding the fact that the due bills signed by Alonso required payment within three days, neither libelant nor its agent ever made any demand for payment of these allegedly unpaid

freights upon either of these respondents, nor gave them any notice that it claimed Alonso had not paid the freights, until May 9, 1955, almost eleven months after the first shipment was made for Tyler; this delay the court finds both unreasonable and inexcusable. All demands for payment were made by libelant upon Alonso Shipping Co., Inc.

23.

In the interim between the first shipment and the demand upon respondents, Perez had remitted over Six Thousand Dollars and Tyler had remitted over Three Thousand Dollars to the failing and apparently dishonest Alonso.

24.

Libelant knew, through its agent, that Alonso had been paid in full by respondents for the amount of the freights here involved.

25.

Libelant's failure, under these circumstances, to notify respondents was highly prejudicial to them, in view of the financial difficulty into which libelant knew Alonso had fallen.

26.

On May 24, 1955, libelant received payment in full for the freights which are the subject of these suits, by virtue

of a remittance from its agent, Isbrandtsen, whom the court finds to be the real party at interest in this litigation.

27.

The court finds further that the reason for Isbrandtsen's failure to apprise respondents of the true situation with respect to Alonso was the hope of gain on the part of libelant's agent and an attempt to curry the favor of Alonso Shipping Company, Inc. by not exposing its defalcations to respondents. This was of no benefit to respondents.

CONCLUSIONS OF LAW

I.

The court has jurisdiction of the parties hereto and of the subject matter, a suit to recover ocean freights, which is within the admiralty and maritime jurisdiction of the United States.

II.

In admiralty, an action must be instituted by the real party at interest. Benedict, on Admiralty, Vol. 2, p. 43. However, it may also be said that the legal subrogation which occurred in favor of Isbrandtsen by virtue of its payment of these freights to Venezuelan Line included the right to pursue its collection remedy in Venezuelan's name. Benedict, on Admiralty, Vol. 2, pp. 82-85. Because of the view taken by the court, this issue is moot; since Isbrandtsen was the *alter ego* of Venezuelan Line throughout the transactions in suit, neither can acquire any better rights

than the other against these respondents by virtue of any subrogation. See Am. Jur. Subrogation, Sec. 3; see also *U. S. Fidelity and Guaranty Co. v. Wooldridge*, 295 F. 847, 849 (CCA 5th, 1924).

III.

The question of whether Alonso was the agent of respondents or of libelant, with respect to the collection of the freights involved, is likewise immaterial, because this is not a situation in which the court deems it pertinent to determine this question. (But see *Alcoa SS Co. v. Graver*, 1953 AMC 844, 846 (C. Ct. N. Y., 1953) Furthermore, the maxim, that as between an innocent principal and an innocent third party, the principal must bear the risk of his agent's infidelity, is inapplicable here because the "third party", Venezuelan Line, was not an "innocent party" in view of its knowledge of Alonso's defalcations and its failure to apprise these respondents thereof in order that they could have protected themselves by discontinuing their dealings.

IV.

In the circumstances of this case, libelant is estopped to deny that it has been paid in full for the freight charges because of the fact that the conduct of its agent in circulating the "Prepaid" copies of, and the "Freight to be Pre-paid" originals of, the bills of lading induced these respondents to settle their accounts with Alonso, to their patent detriment. Restatement of the Law of Agency, Section 183; See also *Hyde v. Wolf*, 4 La. 234, 236 (1832) and 2 Am. Jr., Agency, Sec. 354, p. 276 and Sec. 399, p. 313.

V.

In addition, the court concludes that libelant dealt with Alonso as principal throughout these transactions, as evidenced by the facts that it was Alonso's credit which was established with libelant's agent and no benefit inured to respondents therefrom; the account was kept in the name of Alonso; imputation of payments was made without regard to any considerations other than libelant's convenience; and no demand was ever made upon these respondents, except as an afterthought, on libelant's part until almost a year after the first transaction in each case. In these circumstances, with knowledge of respondents' identities from the inception of these transactions, libelant cannot now look to respondents for payment. See 2 Am. Jr., Agency, Sec. 356, p. 277 and *Hyde v. Wolf, supra; Alcoa Steamship Co. v. Graver Tank & Mfg. Co.*, 1953 A.M.C. 844; cf *Alcoa SS Co. v. Comfort Spring Corp.*, 1959 A.M.C. 1017.

VI.

Even if it be said that these respondents must take the consequences of Alonso's misapplication of their funds because Alonso was respondents' agent, libelant and its agent were guilty of such inexcusable delay in asserting these claims and prejudiced respondents' position so severely thereby that libelant and its agent are guilty of such laches that it would be inequitable to allow either of them to enforce these claims, if any there were, against respondents. *Czaplicki v. S. S. Hoegh Silvercloud*, 351 U.S. 525, 1956 A.M.C. 1465 (1956).

VII.

Respondents are entitled to a decree dismissing these libels at libelant's cost, which decree has already been entered by the court.

New Orleans, Louisiana, July 12, 1961.

/s/ Herbert W. Christenberry
UNITED STATES
DISTRICT JUDGE

CERTIFICATE

I, the undersigned member of the Bar of this Court, do hereby certify that I have served a copy of the foregoing brief upon proctor for petitioner, James J. Morrison, Esq., by delivering the same to his offices at 1007 National Bank of Commerce Bldg., New Orleans, Louisiana, this __ day of November, 1962.

Samuel C. Gainsburgh